

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Petition for Declaratory Ruling Regarding)	WC Docket No. 14-228
Applicability of the IntraMTA Rule to)	
LEC-IXC Traffic)	

**COMMENTS OF THE WISCONSIN STATE TELECOMMUNICATIONS
ASSOCIATION**

The Wisconsin State Telecommunications Association (the “*WSTA*”) hereby submits these comments pursuant to the December 10, 2014 Public Notice with respect to the Petition for Declaratory Ruling Regarding Applicability of the IntraMTA Rule to LEC-IXC Traffic (the “*Petition*”).¹

INTRODUCTION

Petitioners seek a declaratory ruling from the Commission to confirm that the “intraMTA rule” – under which intraMTA calls exchanged between local exchange carriers (“*LECs*”) and commercial mobile radio service (“*CMRS*”) carriers are subject to reciprocal compensation – does not apply to LEC access charges billed to an interexchange carrier (“*IXC*”) when the IXC terminates traffic to or receives traffic from a LEC via tariffed switched access services.² Petitioners correctly contend that the intraMTA rule, adopted in 1996, in the *Local Competition Order*,³ holds that intraMTA wireless traffic is not subject to access charges, but rather is subject to reciprocal compensation arrangements under Section 251(b)(5) of the Act “*unless it is carried*

¹ *Petition for Waiver of Bright House Networks LLC, the CenturyLink LECs, Consolidated Communications, Inc., Cox Communications, Inc., FairPoint Communications, Inc., Frontier Communications Corporation, LICT Corporation, Time Warner Cable Inc., Windstream Corporation, the Iowa RLEC Group, and the Missouri RLEC Group*, WC Docket No. 14-228 (filed Nov. 10, 2014)(the “*Petition*”)

² *Petition*, at p.2.

³ *In re Implementation of the Local Competition Provisions of the Telecomms. Act of 1996*, First Report and Order, 11 FCC Rcd 15499 ¶¶ 1034-36 (1996) (*subsequent history omitted*) (“*Local Competition Order*”).

by an IXC.”⁴ For the reasons set forth in the Petition and in these Comments, the Commission *should grant* the declaratory ruling requested by Petitioners.

The IntraMTA Rule Does Not Bar a LEC From Assessing Access Charges on IXCs That Use the LECs’ Tariffs Switched Access Services.

The telecommunications industry has functioned for nearly two decades on the premise that traffic routed via tariffed switched access facilities is subject to interstate or intrastate access charges as between the LEC providing the switched access facilities and the IXC using those facilities. A number of IXCs have now filed federal lawsuits and/or are using self-help remedies to avoid paying tariffed switch access rates under the premise that the intraMTA rule insulates them from such payments. The IXCs are wrong.

The intraMTA rule was adopted and intended to apply to traffic exchanged between LECs and CMRS carriers. Under the intraMTA rule LECs may not assess interstate and intrastate switched access charges on CMRS carriers for intraMTA traffic that CMRS carriers exchange with LECs. As it relates to this proceeding, neither Petitioners nor the WSTA take issue with the rule as it applies to charges applicable to CMRS carriers. For 18 years following the promulgation of the intraMTA rule IXCs paid interstate and intrastate access charges without dispute. The Commission has never recognized IXCs as eligible to invoke the intraMTA rule nor has the Commission accepted IXCs as benefactors under the rule. The Commission has done nothing to extend the application of the intraMTA rule to IXCs delivering intraMTA traffic and upset industry accepted billing practices.

As Petitioners correctly point out, the IXC argument for expansive application of the intraMTA rule is not supported by the *Local Competition Order* or the *Connect America Order*⁵.

⁴ Petition at pp. 2-3, citing, *Local Competition Order*, at ¶ 1043 (1996) (*emphasis added*); see also *TSR Wireless, LLC v. U.S. West Communications, Inc.*, 15 FCC rcd 11166, at ¶ 31 (2000) (reiterating that intraMTA traffic is subject to “access charge rules if carried by an interexchange carrier”) (*emphasis added*) (“*TSR Wireless Order*”).

In fact, on October 6, 2014, the U.S. District Court for the Northern District of Iowa, in the context of a Motion to Dismiss or Stay And Refer Issues To The Federal Communications Commission, rejected the arguments of Sprint that the *Local Competition Order* and the *Connect America Order* somehow preclude LECs from billing IXC for intraMTA calls. In this connection, the Court ruled:

First, contrary to Sprint's repeated representations, neither the FCC's 1996 *Local Competition Order* nor its 2011 *Connect America Fund Order* expressly applies to compensation between a LEC and an IXC for intraMTA calls. As the LECs point out, the 1996 *Local Competition Order* distinguishes between service arrangements between LECs and CMRS providers and service arrangements between LECs and IXCs, and did *not* apply its conclusion that service arrangements involving intraMTA traffic between CMRS providers and LECs are subject to reciprocal compensation, not access charges, to service arrangements involving such traffic between LECs and IXCs. *See 1996 Local Competition Order*, 11 FCC Rcd 15499, ¶ 1043 (establishing new rules for compensation between LECs and CMRS providers). Likewise, the 2011 *Connect America Fund Order* only 'clarified' payment arrangements between LECs and CMRS providers, but did not address payment arrangements between LECs and IXCs. *See 26 FCC Rcd 17663*, ¶ 1007 n. 2132.⁶

This decision is consistent with the Commissions holding in the *TSR Wireless Order*. In the *TSR Wireless Order*, the Commission explained that “LEC-originated traffic that originates and terminates within the same MTA” and is exchanged with a CMRS carrier “falls under our reciprocal compensation rules if carried by the incumbent LEC, *and under our access charge rules if carried by an interexchange carrier.*”⁷ This dichotomy is consistent with industry practice and is not in conflict with the purpose of the intraMTA rule.

⁵ *In the Matter of Connect America Fund, A National Broadband Plan for our Future, establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform - Mobility Fund*, The Report And Order And Further Notice Of Proposed Rulemaking, 26 FCC Rcd 17633 (2011), *final rules published*, 76 Fed. Reg. 73830 (Nov. 29, 2011) (subsequent history omitted) (“*Connect America Order*”).

⁶ *Sprint Commc'ns Co. v. Butler-Bremer Mut. Tel. Co.*, No. 14-CV-03028, 2014 U.S. Dist. LEXIS 141758, at *11 (N.D. Iowa Oct. 6, 2014) (Memorandum Opinion and Order Regarding Defendants' Motion to Dismiss or Stay)(emphasis in original) (the “*Sprint/BBMT Opinion and Order*”), attached hereto as **Exhibit 1**.

⁷ *TSR Wireless Order*, at ¶ 31 (emphasis added).

The intraMTA rule does not confer any independent rights or benefits on IXC's. Expansive application of the intraMTA rule to bar LEC recovery of switched access charges from IXC's is not necessary to effectuate the rule, nor is LEC collection of switched access charges from IXC's for use of the LEC's switched access services inconsistent with the rule.

As it relates to LEC end-user originated intraMTA traffic delivered by IXC's to CMRS carriers for termination to the CMRS carriers' end-users, the IXC is involved in the delivery of the call not by the LEC's choosing, but at the election of the LEC's end user. The LEC's end user is a toll customer of the IXC having presubscribed to the IXC's toll service. The LEC end user very likely pays a long distance toll charge for every minute of traffic the IXC delivers at the request of its customer -- the LEC end user. The IXC toll charges are designed to recover LEC switched access charges associated with such traffic. IXC's do not offer a discount on toll rates to their customers if the traffic delivered is intraMTA traffic delivered to a CMRS carrier. IXC's do not offer a refund to their customers if the traffic delivered is intraMTA traffic delivered to a CMRS carrier. IXC's do not offer a credit to their customers if the traffic delivered is intraMTA traffic delivered to a CMRS carrier. Whether the IXC pays LEC switched access charges as it relates to intraMTA traffic delivered to a CMRS carrier has absolutely no negative impact on the CMRS carrier. The IXC's simply want to use the intraMTA rule to avoid paying LEC switched access charges in an effort to increase revenue. This is not the purpose of the intraMTA rule. It should not become a side-effect.

As it relates to CMRS end-user originated intraMTA traffic to be delivered to LEC's for termination to the LEC's' end-users, CMRS carriers have a choice as to how to deliver such traffic just as we have choices as to how to travel from one destination to another. Among the options available to the CMRS carrier are negotiations of an interconnection agreement that

defines the exchange of traffic (which is the Commission's preferred practice⁸) and use of an IXC. IXCs utilize LEC switched access services and are subject to switched access charges. IXCs have every right to pass these costs onto their customers. IXC customers include CMRS carriers, who determine whether to use the IXC as a traffic delivery method based on many factors -- cost being just one. Similarly, cost is but one factor that goes into a decision as to whether to take an airplane, train or automobile to get from Madison, Wisconsin to Chicago, Illinois. Requiring IXCs to continue to pay switched access charges for use of LEC switched access facilities, as has been the norm for nearly two decades, is not inconsistent with the intraMTA rule. Neither IXCs nor CMRS carriers are harmed in any way.

The IXCs Should Bear the Burden of Identifying IntraMTA Traffic

The WSTA agrees with Petitioners that if the Commission concludes that the intraMTA rule applies to the IXC delivered traffic (which it should not), then the Commission must provide guidance to the industry regarding how any such traffic may or should be identified. In all situations the IXCs are in the best position to determine whether the call that is received from a LEC is being terminated to a CMRS carrier or whether the call being delivered to the LEC was originated by a CMRS carrier. As such any obligation regarding identification of the traffic should be borne by the IXC. Accordingly, the Commission should determine that in the absence IXC verifiable evidence as to the identity of intraMTA traffic or a LEC-IXC agreement regarding how to identify/measure such traffic, the default rule is that traffic exchanged between IXCs and LECs by means of tariffed LEC access services is subject to the tariff charges governing such services.

⁸ *In the Matter of Developing a Unified Inter-carrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, CC Docket No. 01-92, 20 FCC Rcd 4855, at ¶ 14 (2005).

The Retroactive Refunds Sought by IXC's are Not Supported by Law and Should be Barred

The IXC's should not be permitted to invoke after-the-fact the rights and benefits under the intraMTA rule particularly where they are not inherently entitled to such rights and benefits. It is fundamentally unfair for IXC's to deliver traffic to a LEC or receive traffic from a LEC, pay switched access charges associated with this traffic without dispute, and later demand a refund claiming that the traffic is subject to the intraMTA rule. Based on long standing past practice the LEC's had no reason to believe that the paid access charges would be disputed or that there was any reason to attempt to determine and calculate the amount of IXC handled traffic that was intraMTA and terminated/originated by a CMRS carrier end-user customer. LEC's billed the IXC's consistent with their tariffs as required under the filed-rate doctrine. As such, no retroactive refund is available to the IXC's. Furthermore, equities demand that LEC's not be held retroactively liable for billing consistent with the well settled, industrywide understanding of the intraMTA rule.

Moreover, retroactive refunds fly in the face of the voluntary payment doctrine. While every state's law may differ somewhat as to the applicability of the voluntary payment doctrine, as it relates to LEC's in Wisconsin the voluntary payment doctrine serves as a bar to an IXC claim for retroactive refund. As such, the Commission should recognize the applicability of the voluntary payment doctrine.

In Wisconsin, the voluntary payment doctrine provides that, as between two parties, "money paid voluntarily, with knowledge of the facts, and without fraud or duress, cannot be recovered merely on account of ignorance or mistake of law."⁹ The voluntary payment doctrine places upon a party who wishes to challenge the validity or legality of a bill for payment the

⁹ *Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship*, 2002 WI 108, ¶ 13, 255 Wis. 2d 447, 649 N.W.2d 626 (2002).

obligation to make the challenge either before voluntarily making the payment, or at the time of voluntarily making payment.¹⁰ In sum, “the voluntary payment doctrine bars recovery of bills or fees previously paid without protest, absent properly pled allegations of fraud, duress, or mistake of fact.”¹¹

In Wisconsin the voluntary payment doctrine has been applied since the late 1800s to bar repayment in various contexts.¹² Most notably, in *Putnam*, the Supreme Court of Wisconsin applied the voluntary payment doctrine to deny plaintiff cable customers a refund of a late payment fee paid by the plaintiff cable customers with full knowledge and without protest.¹³ Four years later, the Wisconsin Court of Appeals in *Butcher v. Ameritech Corp.*, 298 Wis. 2d 468, 727 N.W. 2d 546 (Ct. App. 2006), applied the voluntary payment doctrine to preclude the claims of plaintiffs seeking to recover sales tax paid by the plaintiffs to Ameritech for services that were not subject to sales tax. In *Butcher*, the bills showed the charges for services and the computed sales tax.¹⁴ The plaintiffs paid the bills without protest, knowing that sales tax was included.¹⁵

The voluntary payment doctrine has been applied by the Seventh Circuit Court of Appeals to deny plaintiffs’ claims for refund. In *Spivey v. Adaptive Mktg. LLC*, the plaintiff sued a marketing company for charges that appeared on the plaintiff’s credit card related to a 30-day trial purchase of a diet product.¹⁶ The charges were visible on the credit card statement and the plaintiff was provided with the phone number of the marketing company for any questions regarding the charges. The plaintiff paid the erroneous charges for several years and made no effort to protest the charges. Under these facts, the Seventh Circuit affirmed the trial court’s

¹⁰ *Putnam*, 255 Wis. 2d. at ¶ 13.

¹¹ *Id.* at ¶ 36.

¹² *Id.* at ¶ 14.

¹³ *Id.* at ¶¶ 18-36.

¹⁴ *Butcher*, 298 Wis. 2d at 484.

¹⁵ *Id.*

¹⁶ *Spivey*, 622 F.3d 816 (7th Cir. 2010)(applying Illinois law).

dismissal of the plaintiff's breach of contract and unjust enrichment claims based on the voluntary payment doctrine.¹⁷

Like the plaintiffs in *Putnam*, *Butcher* and *Spivey*, the IXC's made payment with full knowledge of the charges and without protest or object. The IXC's paid the LEC's switched access service charges voluntarily in full knowledge of the terms of the applicable filed tariffs and the FCC orders that the IXC's claim support expansion of the intraMTA rule. The IXC's have not claimed, and cannot claim that they paid switched access charges under fraud, duress, or mistake of fact.

Under no circumstances should any IXC be allowed to obtain damages or refunds for any access charges that it previously paid to LEC's without dispute or complaint, for unidentified intraMTA traffic that it exchanged over access trunks, without notice to or cooperation with the LEC's.

The Commission Should Not Permit IXC Self-Help

LEC's are required to originate and terminate all IXC traffic without blocking or degrading traffic and to route calls to the IXC selected by the IXC's end-user customer. Certain IXC's are engaging in unjust and unlawful self-help by exploiting these obligations. Rather than seek redress under the law, certain IXC's have instead elected to continue to deliver traffic to and accept traffic from LEC's with no intention of compensating the LEC for use of the LEC's switched access services as it relates to intraMTA traffic involving a CMRS carrier. This self-help remedy is an unjust and unreasonable practice under 47 C.F.R. §201(b), and therefore is unlawful.

¹⁷ *Id.*

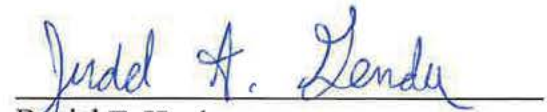
Relief Sought

Consistent with the Petition, the WSTA requests that the Commission confirm in its declaratory ruling the following:

1. IXCs are not eligible to invoke the intraMTA rule and its benefits.
2. Even though intraMTA traffic is non-access traffic in the context of direct billing from a LEC to a CMRS provider, *any* traffic that is voluntarily routed by means of a LEC's tariffed switched access facilities outside of an ICA (or other negotiated agreement with the LEC) is subject to access charges - and an IXC's historical payment of such charges without dispute is evidence that the access arrangement was entered into voluntarily.
3. The Commission's prior orders confirm that: (i) absent a LEC's agreement to an alternative billing arrangement, any traffic routed through an IXC and utilizing a LEC's access facilities is access traffic exchanged between the IXC and the originating/terminating LEC and may be treated as such; and (ii) where traffic is routed via an IXC (and, in turn, through a LEC's access facilities) the IXC bears the burden of demonstrating that the LEC has agreed to exempt the traffic from access charges.
4. Where a LEC makes access facilities (*e.g.*, Feature Group D trunks) available pursuant to switched access tariffs, an IXC that orders and routes or receives traffic (even intraMTA traffic) through those access facilities must pay tariffed rates in connection with such traffic consistent with duly filed tariffs.
5. It is unjust and unreasonable for an IXC to engage in self-help by refusing to pay access charges incurred in connection with unrelated, undisputed traffic in order to award itself a *de facto* refund of payments already made in connection with intraMTA wireless traffic routed via a LEC's access facilities.

February 9, 2015

Respectfully submitted,



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EXHIBIT 1

Sprint Communs. Co., L.P. v. Butler-Bremer Mut. Tel. Co.

United States District Court for the Northern District of Iowa, Central Division

October 6, 2014, Decided; October 6, 2014, Filed

No. C 14-3028-MWB

Reporter

2014 U.S. Dist. LEXIS 141758

SPRINT COMMUNICATIONS COMPANY, L.P., Plaintiff, vs. BUTLER-BREMER MUTUAL TELEPHONE COMPANY, CLEAR LAKE INDEPENDENT TELEPHONE COMPANY, COON CREEK TELEPHONE COMPANY, FARMERS COOPERATIVE TELEPHONE COMPANY, GOLDFIELD TELEPHONE COMPANY, HEART OF IOWA COMMUNICATIONS COOPERATIVE, MABEL COOPERATIVE TELEPHONE COMPANY, NORTH ENGLISH COOPERATIVE TELEPHONE COMPANY, FARMERS MUTUAL TELEPHONE COOPERATIVE OF SHELLSBURG, IOWA, d/b/a USA Communications, WEBSTER-CALHOUN COOPERATIVE TELEPHONE ASSOCIATION, and WINNEBAGO COOPERATIVE TELECOM ASSOCIATION, Defendants.

Goldfield Telephone Company, Heart of Iowa Communications Cooperative, Mabel Cooperative Telephone Company, North English Cooperative Telephone Company, Farmers Mutual Telephone Cooperative of Shellsburg, Iowa, doing business as USA Communications, Webster-Calhoun Cooperative Telephone Association, Winnebago Cooperative Telecom Association, Defendants: John Pietila, Davis Brown Law Firm, Des Moines, IA; Kris Holub Tilley, Davis Brown Koehn Shors & Roberts, Des Moines, IA; Sarah Elizabeth Crane, Steven L Nelson, Davis, Brown, Koehn, Shors & Roberts, PC, Des Moines, IA.

For McLeodUSA Telecommunication Services, LLC, Defendant: Juliet A Cox, LEAD ATTORNEY, PRO HAC VICE, Kutak Rock, LLP, Kansas City, MO; Samuel L Blatnick, LEAD ATTORNEY, Kutak Rock, LLP, Kansas City, MO.

Core Terms

issues, charges, referral, traffic, primary jurisdiction, doctrine of primary jurisdiction, arrangements, carriers, reciprocal, regulations, Communications, proceedings, expertise, providers, intraMTA, parties, grounds for dismissal, switched, relies, compensation arrangement, intermediary, decisions, services, tariffed, tariffs

Judges: MARK W. BENNETT, UNITED STATES DISTRICT JUDGE.

Opinion by: MARK W. BENNETT

Counsel: [*1] For Sprint Communications Company, LP, Plaintiff: Brant M Leonard, Bret Alan Dublinske, LEAD ATTORNEYS, Fredrikson & Byron, P.A., Des Moines, IA.

Opinion

MEMORANDUM OPINION AND ORDER REGARDING DEFENDANTS' MOTION TO DISMISS

[*2] **OR STAY**

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For Butler-Bremer Mutual Telephone Company, Clear Lake Independent Telephone Company, Coon Creek Telephone Company, Farmers Cooperative Telephone Company,

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I. INTRODUCTION

In this action, plaintiff Sprint Communications Company, L.P., an interexchange carrier or IXC, seeks a refund of, and declaratory bar to, allegedly improper switched access charges by defendant local exchange carriers (LECs), from their intrastate and interstate switched access tariffs, for exchange of wireless communications between Commercial Mobile Radio Service (CMRS) carriers and the LECs that originate and terminate in the same "Major Trading Area" (intraMTA calls) where Sprint acts as an intermediary carrier. Sprint alleges that it should not have been billed access charges, applicable to "long distance calls," for these calls, because these calls are "local calls" subject to reciprocal compensation, pursuant to longstanding Federal Communications Commission (FCC) rules and federal appellate court decisions.¹

This case is now before me on the defendant LECs' July 14, 2014, Motion To Dismiss Or Stay And Refer Issues To The Federal Communications Commission (docket no. 8). After an extension of time to do so, Sprint filed its Resistance (docket no. 17) on August 21, 2014, and the LECs filed a Reply (docket no. 25) in further support of their motion on September 15, 2014.

The LECs requested oral arguments on their Motion To Dismiss, because they contend that this case involves complex technical and policy issues in telecommunications regulation and the interpretation and application of orders, rules, and regulations promulgated by the FCC over the past 18 years, and, as such, that oral arguments will allow the court an opportunity to question counsel, which should assist the court. I do not find oral arguments to be necessary in this case, nor has my crowded schedule permitted the timely hearing of such oral arguments. Therefore, I will consider the LECs' Motion To Dismiss fully submitted on the parties' written submissions.

II. LEGAL [*4] ANALYSIS

A. Grounds For Dismissal Or Stay

The LECs first assert that Sprint's Complaint should be dismissed for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, because Sprint's claims are barred by

application of the "filed rate doctrine" and "the voluntary payment doctrine." In the alternative, the LECs argue that Sprint's Complaint should be dismissed without prejudice, or that this action should be stayed, and the claims referred to the FCC, because the FCC has "primary jurisdiction" over Sprint's claims. Sprint disputes each of the LECs' grounds for dismissal or stay.

I conclude that I must consider, first, the LECs' alternative arguments for dismissal or stay in light of the FCC's "primary jurisdiction." If, indeed, the FCC has "primary jurisdiction," and the issues presented are properly referred to the FCC, it would be improper for me to circumvent the FCC's "primary jurisdiction" by considering whether Sprint's Complaint states claims upon which relief can be granted, and the FCC's determination on issues within its "primary jurisdiction" may be dispositive of the other grounds for dismissal asserted by the LECs. If, on the other hand, I need not defer [*5] to the FCC's "primary jurisdiction," then I would be free to consider whether dismissal of Sprint's Complaint pursuant to Rule 12(b)(6) is appropriate.

B. Primary Jurisdiction

1. Arguments of the parties

The LECs argue that application of the "primary jurisdiction doctrine" warrants dismissal of Sprint's Complaint, because referral to the FCC would have the following beneficial effects: (1) it would ensure national uniformity and consistency in deciding the legal issues that are at the heart of the more than 30 (and counting) complaints that Sprint has filed in various federal and state courts; and (2) it would allow the FCC to address the applicability of the LECs' switched access tariffs, to determine the effects of the FCC's own orders on those tariffs (including its 1996 *Local Competition Order* and its 2011 *Connect America Fund Order*), to determine the impact of Sprint's unjustifiable delay in asserting its claims, and to address the prospective relief that Sprint is seeking, which are all legal issues that require an exercise of the FCC's expertise and experience. The LECs argue that Sprint will not be unfairly disadvantaged by dismissal of its Complaint, because any subsequent legal action will [*6] likely involve an appeal from the FCC's decision, not the present claims, even if the present claims become time-barred during the pending of administrative proceedings. Nevertheless, the LECs concede

¹ Sprint's claims in its May 7, 2014, Complaint [*3] (docket no. 1) are framed as "breach of contract" (Counts I (Iowa defendants) and II (Minnesota defendants)) and "declaratory relief" (Count III (all defendants)).

that, if I conclude that there would be some unfair disadvantage to Sprint, I could and should stay Sprint's action pending disposition of claims referred to the FCC.

In response, Sprint argues, in essence, that the FCC and the federal courts have already addressed the issues that the LECs want referred to the agency so that all that remains is for this court to apply those prior determinations. Indeed, Sprint argues that the impropriety of billing switched access charges for intraMTA calls has been apparent since the FCC's 1996 *Local Competition Order* and that the FCC clarified the impact of that order in its 2011 *Connect America Fund Order* by stating, categorically, that intraMTA calls are local traffic subject to reciprocal compensation, not long distance traffic subject to switched access charges. Sprint asserts that the federal appellate courts to consider the question are all in agreement, citing *Alma Communications Co. v. Missouri Public Service Comm'n*, 490 F.3d 619 (8th Cir. 2007); *Iowa Network Services, Inc. v. Qwest Corp.*, 466 F.3d 1091 (8th Cir. 2006); and *Atlas Telephone Co. v. Oklahoma Corp. Commission*, 400 F.3d 1256 (10th Cir. 2005).

In reply, the LECs argue that Sprint ignores the federal law that controls [*7] the compensation arrangements between LECs, like themselves, and IXC, such as Sprint. They point out that Sprint cites to cases and quotes parts of FCC orders related to compensation arrangements *between LECs and cellular service (CMRS) providers*, but does not address the law that governs compensation between LECs and IXCs. They point out that the FCC's 1996 *Local Competition Order*, on which Sprint relies, expressly states that (i) the FCC's existing rules for compensation arrangements between LECs and IXCs would continue to apply to IXCs that routed intraMTA traffic over switched access service arrangements that the IXCs purchased from the LECs' tariffs, and (ii) those IXCs would continue to be required to pay the LECs' tariffed access charges applicable to those services. They argue that the FCC's 2011 *Connect America Fund Order* also does not apply to compensation arrangements between a LEC and an IXC, but between a CMRS provider and a LEC. Likewise, they argue, the decisions of the Circuit Courts of Appeals on which Sprint relies do not relate to the issues of compensation arrangements between a LEC and an IXC for intraMTA traffic. Finally, they point out that Sprint has never [*8] requested local compensation arrangements in all the years since the 1996 *Local Competition Order* on which it now relies, so that its claims are barred.

2. Discussion

a. The primary jurisdiction doctrine

As the Eighth Circuit Court of Appeals has succinctly explained,

Primary jurisdiction "is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." *Reiter v. Cooper*, 507 U.S. 258, 268, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993). The doctrine "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63, 77 S.Ct. 161, 1 L.Ed.2d 126, 135 Ct. Cl. 997 (1956). Primary jurisdiction "promotes uniformity, consistency, and the optimal use of the agency's expertise and experience." [*United States v. Henderson*, 416 F.3d [686,] 691 [(8th Cir. 2005)]]

United States v. Rice, 605 F.3d 473, 475 (8th Cir. 2010). The Eighth Circuit Court of Appeals has recognized, however, that "[t]he doctrine is to be 'invoked sparingly, as it often results in added expense and delay.'" *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 938 (8th Cir. 2005) (quoting *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 477 (8th Cir. 1988)).

The Eighth Circuit Court of Appeals has made clear that "[t]he doctrine targets issues." *Rice*, 605 F.3d at 476, (emphasis in the original). Thus, [*9] there must be an issue that the district court could "refer" to the administrative agency under the "primary jurisdiction doctrine." *Id.* (citing *Reiter*, 507 U.S. at 268 and n.3). The question is whether the case would require the court to "decide any issues on which an administrative ruling would be appropriate," and, more specifically still, an issue "suited to the 'expert and specialized knowledge of the [agency].'" *Id.* at 476 (quoting *W. Pac. R.R.*, 352 U.S. at 64). Disputed factual issues are not properly ones within agency expertise, such that they should be referred to an agency pursuant to the "primary jurisdiction doctrine," because such issues properly fall within the function of a jury. *Henderson*, 416 F.3d at 691. Moreover, "expert consideration and uniformity of resolution" by an agency are not required where the issue presented merely turns on the meaning of published agency regulations, because interpretation of such materials "is well within the 'conventional experience of judges.'" *Alpharma, Inc.*, 411 F.3d at 939 (quoting *Access Telecomm. v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998)).

On the other hand, where determination of the scope and application of agency regulations requires agency expertise, referral pursuant to primary jurisdiction is appropriate. *Id.* (contrasting a determination of whether a competitor's product had received FDA approval [*10] for certain uses, which turned on the meaning of agency publications, and, thus, was not appropriate for referral to the FDA, with the question of whether the competitor's product *should have been approved as safe and effective*, which was a question that required the FDA's scientific expertise, although that question had not been raised in the case). Similarly, "application of the [primary jurisdiction] doctrine is appropriate when policy considerations are at issue," *Atlantis Express, Inc. v. Standard Transp. Servs., Inc.*, 955 F.2d 529, 532-33 (8th Cir. 1992), such as when resolution of the issue could have an impact on future viability of regulated businesses or how they conduct their business. *Id.* at 535 (remanding with directions to refer to the Interstate Commerce Commission (ICC) the question of whether a licensed freight broker, which arranged transportation services on behalf of shippers and carriers, should be liable for certain freight charges and, if so, what the amount of this liability would be).

b. Is referral to the agency appropriate?

If this case merely involved the interpretation and application of prior FCC rulings and case law, as Sprint contends, then dismissal or a stay and referral to the FCC under the "primary jurisdiction doctrine" would be inappropriate. See [*11] *Alpharma, Inc.*, 411 F.3d at 939. This is not such a case, however.

First, contrary to Sprint's repeated representations, neither the FCC's 1996 *Local Competition Order* nor its 2011 *Connect America Fund Order* expressly applies to compensation between a LEC and an IXC for intraMTA calls. As the LECs point out, the 1996 *Local Competition Order* distinguishes between service arrangements between LECs and CMRS providers and service arrangements between LECs and IXCs, and did not apply its conclusion that service arrangements involving intraMTA traffic between CMRS providers and LECs are subject to reciprocal compensation, not access charges, to service arrangements involving such traffic between LECs and IXCs. See 1996 *Local Competition Order*, 11 FCC Rcd 15499, ¶ 1043 (establishing new rules for compensation between LECs and CMRS providers). Likewise, the 2011 *Connect America Fund Order* only "clarified" payment arrangements between LECs and CMRS providers, but did not address payment arrangements between LECs and IXCs. See 26 FCC Rcd 17663, ¶ 1007 n.2132.

Second, the federal appellate decisions on which Sprint relies also *do not* involve interpretation or policy analysis of FCC regulations regarding payment arrangements between LECs and IXCs. The Eighth Circuit Court of Appeals [*12] explained that, in *Iowa Network Services, Inc. v. Qwest Corp.*, 466 F.3d 1091 (8th Cir. 2006) (INS), it had "held that an intermediary carrier was not required to pay access charges for cell-phone to land-line calls originating and terminating within a major trading area." *Alma Commc'ns Co. v. Missouri Public Serv. Comm'n.*, 490 F.3d 619, 625 (8th Cir. 2007) (summarizing the decision in INS). Nevertheless, the decision in INS turned on the following lacuna in FCC regulation, which a *state* agency had filled:

In the absence of a clear mandate from the FCC or Congress stating how charges for this type of traffic should be determined, or what type of arrangement between carriers should exist, the Act has left it to the state commissions to make the decision, as long as it does not violate federal law and until the FCC rules otherwise. . . . As the IUB acted within its power under statute, we find no error.

INS, 466 F.3d at 1097. Thus, INS cannot be read as a judicial conclusion that the FCC's regulations *require* reciprocal compensation between LECs and IXCs for the traffic in question. Also, INS involved litigation over compensation between *two intermediary carriers*, INS and Qwest, not between a LEC and an IXC or intermediary carrier. *Id.* at 1095 (noting that both Qwest and INS are intermediary carriers). *Alma Communications Company*, on which Sprint also relies, likewise did [*13] not involve litigation over compensation between a LEC and an IXC, but compensation between a LEC and a CMRS provider. See 490 F.3d at 620. The same is true of the out-of-circuit decision in *Atlas Telephone Company v. Oklahoma Corporation Commission*, 400 F.3d 1256, 1260 (10th Cir. 2005).

Moreover, the question of whether the same "reciprocal compensation" requirement that applies between a LEC and a CMRS should apply between a LEC and an IXC is not just a matter of "interpretation" of FCC rulings, but a determination of the scope and applicability of FCC rulings, which requires agency expertise. Consequently, it is an appropriate issue for referral to the FCC under the "primary jurisdiction doctrine." *Alpharma, Inc.*, 411 F.3d at 939 (contrasting a determination of whether a competitor's product had received FDA approval for certain uses, which turned on the meaning of agency publications and was not appropriate for referral to the FDA, with the question of whether the competitor's product *should have been approved*

as safe and effective, which was a question that required the FDA's scientific expertise, but which had not been raised in that case). That determination is fraught with policy considerations involving the impact of certain regulatory decisions upon the telecommunications industry that are also best considered by [*14] the appropriate agency. See Atlantis Express, Inc., 955 F.2d at 535, 532-33 (remanding with directions to refer to the ICC the question of whether a licensed freight broker, which arranged transportation services on behalf of shippers and carriers, should be liable for certain freight charges and, if so, what the amount of this liability would be, because those issues involved the viability of a part of the industry and the impact of the regulations). This may be all the more true where, as here, the FCC ruling on which Sprint relies was handed down in 1996. Thus, Sprint did not seek application of the FCC ruling, as it now interprets it, to the current parties, for more than 18 years, which suggests that the interpretation of the FCC's ruling that Sprint presses is not as obvious as Sprint contends.

Under the circumstances presented here, the question of whether compensation between LECs and IXC's for the traffic in question is subject to reciprocal compensation or filed tariffs is one properly referred to the FCC under the "primary jurisdiction doctrine."

c. Is dismissal or a stay appropriate?

The LECs seek dismissal of Sprint's Complaint upon referral of issues to the FCC under the "primary jurisdiction doctrine," at least in the [*15] first instance, but they concede that a stay would be acceptable, as well. Sprint argues that dismissal is not appropriate, because the FCC does not have jurisdiction over the entire case. This contention apparently stems from Sprint's damages claim, because Sprint suggests that dismissal might preclude its damages claim, if the statute of limitations expires on its Communications Act claims before a ruling from the FCC. It is clear that either a dismissal or a stay is appropriate, once a district court has determined that it should refer issues to an agency under the "primary jurisdiction doctrine." See Rice, 605 F.3d at 475 (stating that a stay of further proceedings is appropriate to give the parties a reasonable opportunity to seek an administrative ruling (citing Reiter, 507 U.S. at 268)); Henderson, 416 F.3d at 691 (explaining that the district court has the power to dismiss or stay the action in deference to administrative agency proceedings). What is less clear from decisions of the Eighth Circuit Court of Appeals is when and how the district court should decide whether to dismiss or stay the action before it. Whatever factors may be appropriate in that calculus, the one I find determinative here is that there is some possibility that the

statute [*16] of limitations could run on Sprint's damages claim, while the FCC considers the regulatory issues, if its Complaint is dismissed. Consequently, I will stay this action, rather than dismiss it, pending completion of FCC proceedings.

C. Other Grounds For Dismissal

The LECs also sought dismissal of Sprint's claims pursuant to Rule 12(b)(6), on the grounds that Sprint's claims are barred by application of the "filed rate doctrine" and "the voluntary payment doctrine." The FCC's determination of whether reciprocal compensation or tariffed access charges are applicable to the traffic in question between a LEC and an IXC will necessarily determine whether the "filed rate doctrine" applies and will necessarily determine whether there are any "voluntary payments" for Sprint to attempt to recoup. Therefore, I will not reach these separate grounds for dismissal of Sprint's Complaint.

III. CONCLUSION

Upon the foregoing,

1. The defendant LECs' July 14, 2014, Motion To Dismiss Or Stay And Refer Issues To The Federal Communications Commission (docket no. 8) is **granted in part, denied in part, and reserved in part**, as follows:

- a. The part of the Motion seeking a referral to the FCC of the issue of whether reciprocal [*17] compensation or tariffed access charges determine the compensation between the LECs and Sprint, an IXC, for the traffic in question is **granted**;
- b. The part of the Motion seeking dismissal of Sprint's Complaint upon referral to the FCC is **denied**;
- c. The part of the Motion seeking a stay of this action upon referral to the FCC is **granted**; and
- d. **Ruling is reserved** on those parts of the Motion seeking dismissal of Sprint's claims pursuant to Rule 12(b)(6), on the grounds that Sprint's claims are barred by application of the "filed rate doctrine" and "the voluntary payment doctrine."

2. The question of whether reciprocal compensation or tariffed access charges determine the compensation between the LECs and Sprint, an IXC, for the traffic in question is **referred** to the FCC as a matter within that agency's primary jurisdiction; and

3. This action is **stayed** pending completion of administrative proceedings before the FCC on the question of whether reciprocal compensation or tariffed access charges determine the compensation between the LECs and Sprint, an IXC, for the traffic in question.

4. The parties shall file a **status report** concerning the need for additional proceedings in this court, if any, upon conclusion [*18] of the administrative proceedings.

IT IS SO ORDERED.

DATED this 6th day of October, 2014.

/s/ Mark W. Bennett

MARK W. BENNETT

U.S. DISTRICT COURT JUDGE

NORTHERN DISTRICT OF IOWA